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In the Supreme Court of the United States

OCTOBER TERM, 1961

No. 24

HALLIBURTON OIL WELL CEMENTING COMPANY,
Appellant,

v.

JAMES S. REILY, COLLECTOR OF REVENUE, STATE OF LOUISIANA (SINCE SUCCEEDED BY ROBERT L. ROLAND, WHO WAS DULY SUCCEEDED BY ROLAND COCREHAM),
Appellee.

On Appeal From The Supreme Court of the State of Louisiana

MOTION TO DISMISS ON BEHALF OF THE COLLECTOR OF REVENUE

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Appellee, through undersigned counsel of record, respectfully moves that this appeal be dismissed on the following grounds:

I.

No substantial federal question is raised by the facts of this case. The incidence of the Louisiana Use Tax is non-discriminatory, and its application in conjunction with the Sales Tax achieves equality of application because it is levied upon the use of tangible personal property after the property has been withdrawn from commerce and has become a part of the mass of property within the State of Louisiana.

The combined effect and purpose of the Sales and Use Tax is to insure that all tangible personal property used or consumed in the State of Louisiana bears a 2% tax either at the time of its original sale at retail in the state or at the time of its first use in the state, if a 2% sales tax has not already been paid either to the State of Louisiana or another state.

STATEMENT OF THE CASE

This is an appeal from a final judgment and decree of the Supreme Court of Louisiana.

Appellant paid certain use taxes under protest and instituted suit for recovery thereof, all pursuant to Section 1576 of the Louisiana Revised Statutes of 1950, set out in full in Appendix A of this motion.

The parties stipulated all of the facts in this case and submitted it for decision to the 19th Judicial District Court of the State of Louisiana. In due course the District Court rendered a judgment in favor of the appellant and against the Collector of Revenue who appealed to the Louisiana Supreme Court. Upon argument and review of the record the Louisiana Supreme Court reversed the District Court's decision and rendered judgment in favor of the Collector of Revenue.

FACTS

The facts in this case have been stipulated by the parties. The principle facts are:

Halliburton Oil Well Cementing Company is engaged in the business of servicing oil wells through-

out the United States. Its operations require the use of specialized oil field equipment which Halliburton manufactures, as well as conventional cars, trucks, and airplanes. All of the equipment involved in this case became a part of a mass of property located in Louisiana. None of the property has ever been subjected in any other state to a similar tax.

In its original action the appellant separated its attack on the application of the use tax into three phases; however, the Collector has conceeded the first phase entitled *Cost Price vs. Depreciated Value*, and that phase is not presented for decision by this Court.

The Labor and Shop Overhead Phase involves equipment manufactured in Duncan, Oklahoma by Halliburton for its own use. Halliburton purchases the component parts and processes, fabricates, and assembles them in its own shops into working units such as oil well cementing trucks and equipment and electrical well logging trucks and equipment. The completed equipment was then brought to Louisiana for use. Halliburton has paid use tax to Louisiana only on the price it has paid for the component parts. The Collector of Revenue assessed additional cost value by including the pro-rata share of labor and shop overhead applicable to each item in determining the taxable "cost" at the time the equipment became part of the mass of property in Louisiana.

The Collector has stipulated that had Halliburton manufactured in Louisiana for its own use here, the Collector would not have assessed a 2% tax

on the intangible cost of labor and shop overhead as such. Halliburton would have paid a 2% sales tax only upon the component parts of the equipment at the time of acquiring them.

The Isolated Sales Phase. In this phase the Collector sought to impose the use tax upon the value of the property as of the time it became part of the mass of property in Louisiana, even though the property happened to be purchased by Halliburton in another state from persons not ordinarily engaged in the business of selling such property at retail. Halliburton has paid no sales or use tax on this property to any other state.

ARGUMENT

The law imposing the tax in question is contained in Chapter 2 of Title 47 entitled "Sales Tax." The provisions pertinent to this case read as follows:

R.S. 47:302:

> "A. There is hereby levied a tax upon the sale at retail, the use, the consumption, the distribution, and the storage for use or consumption in this state, of each item or article of tangible personal property, as defined herein, the levy of said tax to be as follows:
>
> "(1) At the rate of two per centum (2%) of the sales price of each item or article of tangible personal property *when sold at retail in this state;* the tax to be computed on gross sales for the purpose of remitting the amount of tax due the state, and to include each and every retail sale.

"(2) At the rate of two per centum (2%) of the cost price of each item or article of tangible personal property *when the same is not sold but is used, consumed, distributed, or stored for use or consumption in this state;* provided there shall be no duplication of the tax.

"* * *

"The tax levied in this Section shall be collection from the dealer, as defined herein, shall be paid at the time and in the manner hereinafter provided, and shall be, in addition to all other taxes, whether levied in the form of excise, license, or privilege taxes, and shall be in addition to taxes levied under the provisions of Chapter 3 of Subtitle II of this Title." (Italics Supplied)

R.S. 47:301 (13) (As Amended):

"(13) 'Sales price' means the total amount for which tangible personal property is sold, including any services, except services for financing, that are a part of the sale valued in money, whether paid in money or otherwise, and includes the cost of materials used, labor or service costs, except costs for financing which shall not exceed the legal interest rate and a service charge not to exceed 6% of the amount financed, and losses; provided that cash discounts allowed and taken on sales shall not be included, nor shall the sales price include the amount charged for labor or services rendered in installing, applying, remodeling or repairing property sold."

R.S. 47:301 (10):

"(10) 'Retail sale,' or 'sale at retail,' means a sale to a customer or to any person for any pur-

pose other than for resale in the form of tangible personal property, and shall mean and include all such transactions as the collector, upon investigation, finds to be in lieu of sales; provided that sales for resale must be made in strict compliance with the rules and regulations. Any dealer making a sale for resale, which is not in strict compliance with the rules and regulations, shall himself be liable for and pay the tax."

R.S. 47:301 (3):

"(3) 'Cost price' means the actual cost of the articles of tangible personal property without any deductions therefrom on account of the cost of materials, used, labor or service cost, transportation charges or any other expenses whatsoever."

R.S. 47:301 (18):

"(18) 'Use' means and includes the exercise of any right or power over tangible personal property incident to the ownership thereof, except that it shall not include the sale at retail of that property in the regular course of business."

R.S. 47:301 (4):

"(4) 'Dealer' includes every person who manufactures or produces tangible personal property for sale at retail, for use, or consumption, or distribution or for storage to be used or consumed in this state.

'Dealer' is further defined to mean:

"(a) every person, who imports, or causes to be imported, tangible personal property from any state or foreign country for sale at retail, for use,

or consumption, or distribution, or for storage to be used or consumed in this state;

"(b) every person who sells at retail, or who offers for sale at retail, or who has in his possession for sale at retail, or for use, or consumption, or distribution, or storage to be used or consumed in this state, tangible personal property as defined herein;

"(c) any person who has sold at retail, or used, or consumed, or distributed, or stored for use or consumption in this state, tangible personal property and who cannot prove that the tax levied by this Chapter has been paid on the sale at retail, the use, the consumption, the distribution, or the storage of said tangible personal property;"

"* * *"

R.S. 47:303:

"The tax imposed under R.S. 47:302 shall be collectible from all persons, as hereinafter defined, engaged as dealers, as hereinafter defined.

On all tangible personal property imported, or caused to be imported, from other states or foreign country, and used by him, the "dealer", as hereinafter defined, shall pay the tax imposed by this Chapter on all articles of tangible personal property so imported and used, the same as if the said articles had been sold at retail for use or consumption in this state. For the purposes of this Chapter, the use, or consumption, or distribution, or storage to be used or consumed in this state of tangible personal property, shall each be equivalent to a sale at retail, and the tax shall

thereupon immediately levy and be collected in the manner provided herein, provided there shall be no duplication of the tax in any event."

R.S. 47:305:

"* * *

"It is not the intention of this Chapter to levy a tax upon articles of tangible personal property imported into this state, or produced or manufactured in this state, for export; nor is it the intention of this Chapter to levy a tax on bona fide interstate commerce. It is, however, the intention of this Chapter to levy a tax on the sale at retail, the use, the consumption, the distribution, and the storage to be used or consumed in this state, or tangible personal property after it has come to rest in this state and has become a part of the mass of property in this state.

The provisions of this Chapter shall not apply in respect to the use, or consumption, or distribution, or storage of tangible personal property for use or consumption in this state, upon which a like tax equal to, or greater than, the amount imposed by this Chapter has been paid in another state, the proof of the payment of such tax to be according to rules and regulations made by the collector of revenue. If the amount of tax paid in another state is not equal to, or greater than, the amount of tax imposed by this Chapter, then the dealer shall pay to the collector of revenue an amount sufficient to make the tax paid in the other state equal to the amount imposed by this Chapter.

"The 'use tax' under this Chapter shall not

> apply to tangible personal property owned or acquired in this state, or imported into this state, or held or stored in this state, prior to June 7, 1948; but the 'use tax' will apply to all tangible personal property imported or caused to be imported into this state on or after that date, unless the property has previously borne a sales or use tax in another state, equal to or greater than the tax imposed by this Chapter."

Examination of the Louisiana Sales and Use Tax Statute reveals that Louisiana has accomplished an almost perfect equalization of the 2% tax burden. The 2% sales tax and the 2% use tax when applied consistently as the Collector has applied it in this case will assure that prior to the first use or consumption of any and all tangible personal property in the state, such property will be the subject of a 2% tax burden, either by virtue of its first sale at retail, or by virtue of its first use in the State of Louisiana.

The burden is limited to 2% by virtue of the provision prohibiting the duplication of the sales and use tax. Thus, every person in the state who first uses or consumes tangible personal property is placed on an equal economic basis with every other person using or consuming similar property. There is no chance of avoidance of the 2% sales tax burden upon the first use of such property within the state by any party by virtue of his having acquired the property either within or without the state. All property within the state which has once borne an original 2% tax, whether the sales tax or the use tax, is thereafter subject to the same identical rules. Thus, all tangible personal prop-

erty in the state, all of the users, all of the consumers, all of the merchants, dealers, and vendors, are placed in the same economic position with respect to the taxes imposed by Chapter 2 of Title 47 of the Louisiana Revised Statutes.

Appellant complains that because a taxpayer may reduce his tax burden by manufacturing equipment within Louisiana for his own use, there is necessarily an unconstitutional discrimination against goods which are manufactured outside of the State of Louisiana.

Appellant's premise is erroneous. Under the Louisiana law there are two incidents of taxation:

(a) The sale at retail within the State of Louisiana; and

(b) The moment property brought into the State for use becomes part of the mass property of the State which is considered to be a sale at retail.

In the case of *Fontenot v. S.E.W. Oil Corporation*, 232 La. 1011, 95 So. 2d 638 (1957) the Collector sought to collect a use tax based on the purchase price of an article purchased outside of the State of Louisiana even though the article had declined considerably in value before being brought into the State of Louisiana. The Collector erroneously interpreted the phrase "cost price" to mean the purchase price of the article. After a thorough consideration of the sales tax law, and after quoting R.S. 47:303, the Louisiana Supreme Court held:

"According to this section a person importing an article for use in this state must pay the 'use tax' the same as if it had been sold at retail, *and such use shall be considered equivalent to the sale at retail as of the time of importation.* These provisions, along with the others above mentioned, clearly indicate that the 'use tax' is to be computed on the retail price the property would have brought when imported—that is, its then value or worth." (Italics supplied)

In the S.E.W. case the Louisiana Supreme Court pointed up the fundamental purpose of equality of the Louisiana Use Tax. Indeed we are fortunate to have the decision in that case available to assist us in clarifying the issues presented herein. In its opinion the Louisiana Supreme Court pointed out two very important facets of the Louisiana Use Tax—

(1) That the use tax should be computed upon the value of property at the time it is brought into the state and not upon the original purchase or cost price, and

(2) That under the statute the use of property is considered to be equivalent to a sale at retail as of the time of importation. Therefore, the tax should be computed on the retail price the property would bring when imported.

The ruling of the Louisiana Supreme Court in the S.E.W. case is the only possible interpretation of our tax statute which can accomplish the Legislature intent to place all the economic interests using or selling tangible personal property in the state upon an equal basis.

It is fundamental that a state lacks competence to tax transactions or property over which it has no jurisdiction.

The Louisiana Supreme Court recognized that rule. Clearly, this State may not collect a tax based upon a sale which occurred outside of Louisiana. The important point being that the tax is based upon the value of property under the facts and circumstances existing as of the taxable moment. That is, when the property is withdrawn from commerce and becomes part of the mass of property within the state. Anything which occurred prior to that taxable moment, such as the nature of the transaction under which the property was acquired, is purely incidental and totally irrelevant and immaterial to the basis upon which the Louisiana Use Tax is founded. The basis is simply the value of the property as it is at the moment of taxation.

Where an item is manufactured in Louisiana and is never sold at retail there is no taxable moment in Louisiana except for the sale at retail of the component parts for which the manufacturer has paid sales tax. A taxpayer choosing to produce equipment within Louisiana for its own use must consider more than the 2% saving on the additional cost of a similar item purchased at retail or imported into the State for use. By virtue of establishing a manufacturing plant within Louisiana a taxpayer immediately subjects himself to additional ad valorem taxes, an increase of income taxes by virtue of an increase in the property

and wage factor, and if a taxpayer is a corporation, he has subjected himself to additional franchise taxes. The economic and competative position of a taxpayer manufacturing in Louisiana is wholly different from that of a taxpayer who either purchases similar equipment at retail within the State for use or who imports similar equipment from outside the State for use within the State.

The situation of which the appellant complains is not an interstate commerce tax problem but a problem of management in locating and so arranging its operations in such a manner as to reduce its cost of operations to a minimum.

Appellant complains that it is because Halliburton produces its equipment outside of the State of Louisiana and ships it in interstate commerce into Louisiana that Louisiana subjects it to an additional tax upon the shop overhead and labor. This is not so. *Louisiana taxes no one because they are engaged in interstate commerce. Louisiana taxes no one because they are engaged in production outside of the State of Louisiana.* In fact, it is impossible for Louisiana to do so. The tax in this case is imposed because at the taxable moment the cost of the item that has become part of the mass of property within the State included all expenses of construction. The tax is not imposed "because manufacture occurred outside Louisiana" but because appellant brought into Louisiana for use in Louisiana tangible personal property which had not already borne a similar tax.

Halliburton did not bring into Louisiana component parts of equipment but brought into the State of Louisiana a completed item assembled and ready for use. When that item was withdrawn from commerce and became a part of the property within the State of Louisiana, it had a greater *cost* than the unassembled items. It is upon the cost at the moment of taxation that the Collector has assessed the 2% use tax. Commerce is not involved.

Appellant's complaint that Louisiana taxes a casual sale simply because it occurred outside the State is not well taken. Louisiana taxes *no sales outside of the State*, casual or otherwise, and clearly has no jurisdiction to do so. The taxable incident is the property coming into the State for use and becoming a part of the mass of property within the State. Louisiana is not concerned with what occurred prior to that time. The purpose of the tax is to insure that all property *within* the State and out of commerce bears a 2% sales or use tax at the moment of its first use in Louisiana. No other similar tax has ever been paid on this item, if it had, Louisiana would not tax the transaction. A casual sale within the State of Louisiana may be exempted without discrimination because that item will *always* have already borne a 2% sales or use tax.

If we are to accept the premise expounded by the appellant virtually every payer of *sales* tax within the State of Louisiana would have the same complaint and could argue that the 2% sales tax includes

tax on labor and overhead and that any person who produces a similar item within the State for its own use, paying the sales tax only upon the component parts, could avoid the tax upon the labor and overhead, and thus the payer of sales tax is discriminated against.

Nothing is taxed because of what occurred outside Louisiana. The tax is imposed solely by virtue of what occurred in Louisiana after commerce was at an end.

This Court has clearly explained its position in that connection in *Hennéford v. Silas Mason Company*, 300 U.S. 577, 57 S. Ct. 524 (1937). We quote that decision in its entirety.

"Mr. Justice CARDOZO delivered the opinion of the Court.

"A statute of Washington taxing the use of chattels in that state is assailed in this suit as a violation of the commerce clause (Constitution of the United States, art. 1, § 8) in so far as the tax is applicable to chattels purchased in another state and used in Washington thereafter.

"Plaintiffs (appellees in this court) are engaged either as contractors or as subcontractors in the construction of the Grand Coulee Dam on the Columbia river. In the performance of that work they have brought into the state of Washington machinery, materials, and supplies, such as locomotives, cars, conveyors, pumps, and trestle steel, which were bought at retail in other states. The cost of all the articles with

transportation expenses added was $921,189.34. Defendants, the Tax Commission of Washington (appellants in this court) gave notice that plaintiffs had become subject through the use of this property to a tax of $18,423.78, 2 per cent of the cost, and made demand for payment. A District Court of three judges, organized in accordance with section 266 of the Judicial Code (28 U.S.C. § 380 [28 U.S.C.A. § 380]), adjudged the statute void upon its face, and granted an interlocutory injunction, one judge dissenting. 15 F. Supp. 958. The case is here upon appeal. 28 U.S.C. § 380 (28 U.S.C.A. § 380).

"Chapter 180, page 706 of the Laws of Washington for the year 1935, consisting of twenty titles, lays a multitude of excise taxes on occupations and activities. Only two of these taxes are important for the purposes of the case at hand, the 'tax on retail sales,' imposed by title 3, and the 'compensating tax,' imposed by title 4 on the privilege of use. Title 3 provides that after May 1, 1935, every retail sale in Washington, with a few enumerated exceptions, shall be subject to a tax of 2 per cent of the selling price. Title 4, with the heading 'compensating tax,' provides (sections 31, 35) that there shall be collected from every person in the state 'a tax or excise for the privilege of using within this state any article of tangible personal property purchased subsequent to April 30, 1935,' at the rate of 2 per cent of the purchase price, including in such price the cost of transportation from the place where the article was purchased. If those provisions

stood alone, they would mean that retail buyers within the state would have to pay a double tax, 2 per cent upon the sale and 2 per cent upon the use. Relief from such a burden is provided in another section (section 32) which qualifies the use tax by allowing four exceptions. Only two of these exceptions (b and c) call for mention at this time. Subdivision (b) provides that the use tax shall not be laid unless the property has been bought at retail. Subdivision (c) provides that the tax shall not apply to the 'use of any article of tangible personal property the sale or use of which has already been subjected to a tax equal to or in excess of that imposed by this title whether under the laws of this state or of some other state of the United States.' If the rate of such other tax is less than 2 per cent, the exemption is not to be complete (section 33), but in such circumstances the rate is to be measured by the difference.

"The plan embodied in these provisions in neither hidden not uncertain. A use tax is never payable where the user has acquired property by retail purchase in the state of Washington, except in the rare instances in which retail purchases in Washington are not subjected to a sales tax. On the other hand, a use tax is always payable where the user has acquired property by retail purchase in or from another state, unless he has paid a sales or use tax elsewhere before bringing it to Washington. The tax presupposes everywhere a retail purchase by the user before the time of use. If he has manufactured the chattel for himself, or has received it from the manufacturer as a legacy

or gift, he is exempt from the use tax, whether title was acquired in Washington or elsewhere. The practical effect of a system thus conditioned is readily perceived. One of its effects must be that retail sellers in Washington will be helped to compete upon terms of equality with retail dealers in other states who are exempt from a sales tax or any corresponding burden. Another effect, or at least another tendency, must be to avoid the likelihood of a drain upon the revenues of the state, buyers being no longer tempted to place their orders in other states in the effort to escape payment of the tax on local sales. Do these consequences which must have been foreseen, necessitate a holding that the tax upon the use is either a tax upon the operations of interstate commerce or a discrimination against such commerce obstructing or burdening it unlawfully?

"The tax is not upon the operations of interstate commerce, but upon the privilege of use after commerce is at an end.

"Things acquired or transported in interstate commerce may be subjected to a property tax, nondiscriminatory in its operation, when they have become part of the common mass of property within the state of destination. *Wiloil Corp. v. Com. of Pennsylvania*, 294 U.S. 169, 175, 55 S. Ct. 358, 360, 79 L.Ed. 838; *Cudahy Packing Co. v. Minnesota*, 246 U.S. 450, 453, 38 S. Ct. 373, 62 L.Ed. 827; *Brown-Forman Co. v. Kentucky*, 217 U. S. 563, 575, 30 S. Ct. 578, 54 L.Ed. 883; *American Steel & Wire Co. v. Speed*, 192 U.S.

500, 519, 24 S. Ct. 365, 48 L.Ed. 538; *Woodruff v. Parham*, 8 Wall. 123, 137, 19 L.Ed. 382. This is so, indeed, though they are still in the original packages. *Sonneborn Bros. v. Curton*, 262 U.S. 506, 43 S. Ct. 643, 67 L.Ed. 1095; *American Steel & Wire Co. v. Speed, supra; Woodruff v. Parham, supra.* For like reasons they may be subjected, when once they are at rest, to a nondiscriminatory tax upon use or enjoyment. *Nashville, C. & St. L. Ry. Co. v. Wallace*, 288 U.S. 249, 267, 53 S. Ct. 345, 349, 77 L.Ed. 730, 87 A.L.R. 1191; *Edelman v. Boeing Air Transport, Inc.* 289 U.S. 249, 252, 53 S. Ct. 591, 592, 77 L.Ed. 1155; *Monamotor Oil Co. v. Johnson* 292 U.S. 86, 93, 54, S. Ct. 575, 578, 78 L.Ed. 1141. The privilege of use is only one attribute, among many, of the bundle of privileges that make up property or ownership. *Nashville, C. & St. L. Ry. Co. v. Wallace, supra; Bromley v. McCaughn*, 280 U.S. 124, 136-138, 50 S.Ct. 46, 48, 74 L.Ed. 226; *Burnet v. Wells*, 289 U.S. 670, 678, 53 S.Ct. 761, 764, 77 L.Ed. 1439. A state is at liberty, if it pleases, to tax them all collectively, or to separate the faggots and lay the charge distributively. Id. Calling the tax an excise when it is laid solely upon the use *(Vancouver Oil Co. v. Henneford*, 183 Wash. 317, 49 P. (2d) 14) does not make the power to impose it less, for anything the commerce clause has to say of its validity, than calling it a property tax and laying it on ownership. 'A nondiscriminatory tax upon local sales * * * has never been regarded as imposing a direct burden upon interstate commerce and has no greater or different effect upon that commerce than

a general property tax to which all those enjoying the protection of the state may be subjected.' *Eastern Air Transport, Inc. v. South Carolina Tax Commission*, 285 U.S. 147, 153, 52 S.Ct. 340, 341, 76 L.Ed. 673. A tax upon the privilege of use or storage when the chattel used or stored has ceased to be in transit is now an impost so common that its validity has been withdrawn from the arena of debate. *Nashville, C. & St. L. Ry. Co. v. Wallace, supra; Edelman v. Boeing Air Transport, Inc. supra; Monamotor Oil Co. v. Johnson, supra. Cf. Vancouver Oil Co. v. Henneford, supra.*

"The case before us does not call for approval or disapproval of the definition of use or enjoyment in the rules of the Commission. Those rules inform us that 'property is put to use by the first act after delivery is completed within the state by which the article purchased is actually used or is made available for use with intent actually to use the same within the state. The term "made available for use" means and includes the exercise of any right or power over tangible personal property preparatory to actual use within the state, such as keeping, storing, withdrawing from storage, moving, installing or performing any act by which dominion or control over the property is assumed by the purchaser.' A tax upon a use so closely connected with delivery as to be in substance a part thereof might be subject to the same objections that would be applicable to a tax upon the sale itself. If the rules are too drastic in that respect or others, the defect is unimportant in relation to this case.

Here the machinery and other chattels subjected to the tax have had continuous use in Washington long after the time when delivery was over. The plaintiffs are not the champions of any rights except their own.

"The tax upon the use after the property is at rest is not so measured or conditioned as to hamper the transactions of interstate commerce or discriminate against them.

"Equality is the theme that runs through all the sections of the statute. There shall be a tax upon the use, but subject to an offset if another use or sales tax has been paid for the same thing. This is true where the offsetting tax became payable to Washington by reason of purchase or use within the state. It is true in exactly the same measure where the offsetting tax has been paid to another state by reason of use or purchase there. No one who uses property in Washington after buying it at retail is to be exempt from a tax upon the privilege of enjoyment except to the extent that he has paid a use or sales tax somewhere. Everyone who has paid a use or sales tax anywhere, or, more accurately, in any state, is to that extent to be exempt from the payment of another tax in Washington.

"When the account is made up, the stranger from afar is subject to no greater burdens as a consequence of ownership than the dweller within the gates. The one pays upon one activity or incident, and the other upon another, but the sum is the same when the reckoning is closed. Equality exists when the chattel sub-

jected to the use tax is bought in another state and then carried into Washington. It exists when the imported chattel is shipped from the state of origin under an order received directly from the state of destination. In each situation the burden borne by the owner is balanced by an equal burden where the sale is strictly local. 'There is no demand in [the] Constitution that the state shall put its requirements in any one statute. It may distribute them as it sees fit, if the result, taken in its totality, is within the state's constitutional power.' *Gregg Dyeing Co. v. Query*, 286 U.S. 472, 480, 52 S.Ct. 631, 634, 76 L.Ed. 1232, 84 A.L.R. 831. If the sales tax were abolished, the buyer in Washington would pay at once upon the use. He would have no longer an offsetting credit. While the sales tax is in force, he pays upon the sale, and pays at the same rate. For the owner who uses after buying from afar the effect is all one whether his competitor is taxable under one title or another. This common sense conclusion has ample precedent behind it. Alabama laid a tax on the sale of spirituous liquors, the products of sister states. Comparing the tax with others applicable to domestic products, the court upheld the statute. The methods of collection were different, but the taxes were complementary and were intended to effect equality. *Hinson v. Lott*, 8 Wall. 148 19 L.Ed. 387. Louisiana laid a tax in lieu of local taxes on rolling stock operated within the state, but belonging to corporations domiciled elsewhere. The court compared the tax with the local taxes upon residents, and found discrimination lack-

ing. *General American Tank Car Corp. v. Day*, 270 U.S. 367, 372, 373, 46 S.Ct. 234, 235, 70 L.Ed. 635. South Carolina laid a tax on the storage of gasoline brought from other states and held for use in local business. The statute (Act S.C. April 4, 1930, 36 St. at Large, p. 1390) was interpreted by the state court, *Gregg Dyeing Co. v. Query*, 166 S.C. 117, 164 S.E. 588, 593, as covering 'all gasoline stored for use and consumption upon which a like tax has not been paid under other statutes.' Upon comparison of all the statutes, the impost was upheld. The taxpayers had 'failed to show that, whatever distinction there existed in form, there was any substantial discrimination in fact.' *Gregg Dyeing Co. v Query, supra.*

"*Baldwin v. G. A. F. Seelig, Inc.* 294 U.S. 511, 55 S.Ct. 497, 79 L.Ed. 1032, 101 A.L.R. 55, is invoked by appellees as decisive of the controverys, but the case is far apart from this one. There a statute of New York had made provision for a minimum price to be paid by dealers in milk to producers in that state. Cf. *Nebbia v. New York*, 291 U.S. 502, 54 S.Ct. 505, 78 L.Ed. 940, 89 A.L.R. 1469; *Hegeman Farms Corp. v. Baldwin*, 293 U.S. 163, 55 S.Ct. 7, 79, L.Ed. 259. The same statute provided that when milk from another state had been brought into New York, the dealer should be prohibited from selling it at any price unless in buying the milk from the out-of-state producer he had paid the price that would be necessary if he had bought within the state. New York was attempting to project its legislation within the borders

of another state by regulating the price to be paid in that state for milk acquired there. She said in effect to farmers in Vermont: Your milk cannot be sold by dealers to whom you ship it in New York unless you sell it to them in Vermont, at a price determined here. What Washington is saying to sellers beyond her borders is something very different. In substance what she says is this: You may ship your goods in such amounts and at such prices as you please, but the goods when used in Washington after the transit is completed, will share an equal burden with goods that have been purchased here.

"We are told that a tax upon the use, even though not unlawful by force of its effects alone, is vitiated by the motives that led to its adoption. These motives cause it to be stigmatized as equivalent to a protective tariff. But motives alone will seldom, if ever, invalidate a tax that apart from its motives would be recognized as lawful. *Magnano Co. v. Hamilton*, 292 U.S. 40, 44, 54 S.Ct. 599, 601, 78 L.Ed. 1109; *Fox v. Standard Oil Co.*, 294 U.S. 87, 100, 101, 55 S.Ct. 333, 338, 339, 79 L.Ed. 780. Least of all will they be permitted to accomplish that result when equality and not preference is the end to be achieved. Catch words and labels, such as the words 'protective tariff,' are subject to the dangers that lurk in metaphors and symbols, and must be watched with circumspection lest they put us off our guard. A tariff, whether protective or for revenue, burdens the very act of importation, and if laid by a state upon its commerce with another is equally unlawful whether

protection or revenue is the motive back of it. But a tax upon use, or what is equivalent for present purposes, a tax upon property after importation is over, is not a clog upon the process of importation at all, any more than a tax upon the income or profits of a business. The contention would be futile that Washington in laying an ownership tax would be doing a wrong to nonresidents in allowing a credit for a sales tax already borne by the owner as a result of the same ownership. To contend this would be to deny that a state may develop its scheme of taxation in such a way as to rid its exactions of unnecessary oppression. In the statute in dispute such a scheme has been developed with sedulous regard for every interest affected. Yet a word of caution should be added here to avoid the chance of misconception. We have not meant to imply by anything said in this opinion that allowance of a credit for other taxes paid to Washington made it mandatory that there should be a like allowance for taxes paid to other states. A state, for many purposes, is to be reckoned as a self-contained unit, which may frame its own system of burdens and exemptions without heeding systems elsewhere. If there are limits to that power, there is no need to mark them now. It will be time enough to mark them when a taxpayer paying in the state of origin is compelled to pay again in the state of destination. This statute by its framework avoids that possibility. The offsetting allowance has been conceded, whether the concession was necessary or not, and thus the system has been divested of any sem-

blance of inequality or prejudice. A taxing act is not invalid because its exemptions are more generous than the state would have been free to make them by exerting the full measure of her power.

"Finally, there is argument that the tax now in question, though in form upon the use, was in fact upon the foreign sale, and not upon the use at all, the form being a subterfuge. The supposed basis for that argument is a reading of the statute whereby the use shall not be taxable if the chattel was manufactured by the user or received as a legacy or acquired in any way except through the medium of purchase, and a retail one at that. But the fact that the Legislature has chosen to lay a tax upon the use of chattels that have been bought does not make the tax upon the use a tax upon the sale. One could argue with as much reason that there would be a tax upon the sale if a property tax were limited to chattels so acquired. A legislature has a wide range of choice in classifying and limiting the subjects of taxation. *Bell's Gap R. Co. v. Pennsylvania*, 134 U.S. 232, 237, 10 S. Ct. 533, 33 L.Ed. 892; *Ohio Oil Co. v. Conway*, 281 U.S. 146, 159, 50 S.Ct. 310, 313, 74 L.Ed. 775. The choice is as broad where the tax is laid upon one or a few of the attributes of ownership as when laid upon them all. *Flint v. Stone Tracy Co.*, 220 U.S. 107, 158, 159, 31 S.Ct. 342, 55 L.Ed. 389, Ann. Cas. 1912B, 1312. True, collections might be larger if the use were not dependent upon a prior purchase by the

user. On the other hand, economy in administration or a fairer distribution of social benefits and burdens may have been promoted when the lines were drawn as they were. Such questions of fiscal policy will not be answered by a court. The Legislature might make the tax base as broad or as narrow as it pleased.

"The interlocutory injunction was erroneously granted, and the decree must be Reversed."

CONCLUSION

The Louisiana sales and use tax are complementary taxes designed to assure that prior to its first use within the State all items of tangible personal property bear a 2% tax either within the State of Louisiana or in another State. The achievement of equality is its theme. If a similar tax has been paid anywhere, there is no tax due to the State of Louisiana. The 2% sales or use tax never is applied prior to the tangible personal property being withdrawn from commerce, and it is not until such property becomes part of the mass of the property within the State of Louisiana that the tax applies. An item never bears more than 2% tax because a credit is allowed for a similar tax paid upon the item to another State. Under such circumstances we respectfully urge that there can be no discrimination against interstate commerce, that there is no substantial Federal question involved in this case. That the appeal

of Halliburton Oil Well Cementing Company should be dismissed at its costs.

Respectfully submitted,

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APPENDIX "A"

§ 1576. Payment of tax under protest; remedy at law for recovery

A right of action is hereby created to afford a remedy at law for any person aggrieved by the prohibition of courts restraining the collection of tax, penalty, interest or other charges imposed in this Sub-title. The person resisting the payment of any amount found due by the collector or of enforcement of any provisions of this Sub-title, shall pay the amount found due to the collector and at that time shall give the collector notice of his intention to file suit for the recovery thereof. Upon receipt of this notice the amount paid shall be segregated and held by the collector or his duly authorized representatives for a period of thirty days. If suit is filed within the thirty-day period for the recovery of such amount, the funds segregated shall be further held pending the outcome of the suit. If the person prevails, the collector shall refund the amount to the claimant, with interest at the rate of 2% per annum covering the period from the date said funds were received by the collector to the date of refund.

This Section shall afford a legal remedy and right of action in any state or federal court having jurisdiction of the parties and subject matter, for a full and complete adjudication of any and all questions arising in the enforcement of this Sub-title, as to the legality of any tax accrued or accruing or the method of enforcement thereof. In such action, serv-

ice of process upon the Collector shall be suf icient service, and he shall be the sole necessary and proper party defendant in any such suit.

This Section shall be construed to provide a legal remedy in the state or federal courts, by action at law, in case such taxes are claimed to be an unlawful burden upon interstate commerce, or the collection thereof, in violation of any Act of Congress of the United States Constitution, or the Constitution of the State of Louisiana, or in any case where jurisdiction is vested in any of the courts of the United States.

Upon request of a person and proper showing by such person that the principle of law involved in an additional assessment is already pending before the courts for judicial determination, such person, upon agreement to abide by the decision of the courts, may pay the additional assessment under protest, but need not file an additional suit. In such cases the tax so paid under protest shall be segregated and held by the collector until the question of law involved has been determined by the courts and shall then be disposed of as therein provided.

PROOF OF SERVICE

I, John B. Smullin, attorney of record for appellee in this matter and a member of the bar of this Court, do certify that a copy of this brief was served upon appellant by depositing same this day of August, 1961, in a United States post office, first-class postage prepaid, addressed to the Honorable Benjamin B. Taylor, Jr., attorney of record for appellant, at 11th Floor, Louisiana National Bank Building, Baton Rouge, Louisiana.

John B. Smullin

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